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No. 111

In the Supreme Court of the United States

OCTOBER TERM, 1954

LOUIS SHOMBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 717

LOUIS SHOMBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the Court of Appeals (R. 25–32) are reported at 210 F. 2d 82; the opinion of the District Court (R. 14–21) at 115 F. Supp. 336.

JURISDICTION

The judgment of the Court of Appeals was entered January 25, 1954 (R. 32–33). The petition for a writ of certiorari was filed April 24, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Section 405 (a) of the Immigration and Nationality Act of 1952 provides that a "right in the process of acquisition" on the effective date of the Act shall be governed by prior law unless otherwise provided. Section 405 (b) provides that petitions for naturalization filed before the effective date shall be determined under prior law "except as otherwise specifically provided." Section 318 specifically provides that notwithstanding the provisions of Section 405 (b) no petition for naturalization shall be finally heard if there is pending a deportation proceeding under the 1952 Act or any other Act. The question presented is whether petitioner, who filed a petition for naturalization prior to the effective date of the 1952 Act, but who has pending against him a deportation proceeding instituted after the effective date of the new Act on grounds which were not a basis for deportation before the new Act, may compel a final hearing on his naturalization petition on the theory that he had a right in process of acquisition which, under Section 405 (a), must be determined in accordance with the prior law.

STATUTES INVOLVED

Section 405 of the Immigration and Nationality Act of 1952, provides in relevant part as follows:

> (a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for

naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act, are, unless otherwise specifically provided therein, hereby continued in force and effect. * * * An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended, * * * shall be regarded as a proceeding within the meaning of this subsection.

(b) Except as otherwise specifically provided in title III, any petition for naturalization heretofore filed which may be pending at the time this Act shall take effect shall be heard and determined in accordance with the requirements of law in effect when such petition was filed.

Section 318 of the Immigration and Nationality Act of 1952, provides in relevant part as follows:

> * * * Notwithstanding the provisions of section 405 (b) * * * no person shall be naturalized against whom there is outstanding a final finding of deportability pursuant to a warrant of arrest issued under the provisions of this or any other Act; and no petition for naturalization shall be finally heard by a naturalization court if there is pending against the petitioner a deportation proceeding pursuant to a warrant of arrest issued under the provisions of this or any other Act: * * *

Section 241 (a) (4) of the Immigration and Nationality Act of 1952, provides in relevant part as follows:

> Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who * * * at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefore and regardless of whether the convictions were in a single trial.

Section 19 (a) of the Immigration Act of 1917, 8 U. S. C. (1946 ed.) 155 (a), provided in relevant part as follows:

> any alien * * * who is hereafter sentenced more than once to such a term of imprisonment [of one year or more] because of conviction in this country of any crime involving moral turpitude, committed at any time after entry * * * shall, upon

the warrant of the Attorney General, be taken into custody and deported.

STATEMENT

Petitioner filed a petition for naturalization on December 22, 1952, two days before the effective date of the Immigration and Nationality Act of 1952 (R. 5, 10). During the course of the investigation, it was discovered that petitioner had twice been convicted of crimes involving moral turpitude not arising out of a single scheme of criminal conduct, a fact which rendered him deportable under Section 241 (a) (4) of the 1952 Act (R. 10).

Accordingly on June 22, 1953, a deportation warrant of arrest was issued charging petitioner with being subject to deportation in that he had been convicted of the crimes of grand larceny, second degree, and manslaughter in the first degree (R. 11). On June 24, 1953, a hearing on the deportation charge was held before a special inquiry officer (R. 7, 11).

On July 28, 1953, petitioner obtained an order to show cause directed to the District Director of Immigration seeking to have the petition for naturalization brought on for final hearing and staying the deportation hearing (R. 3–4). Petitioner argued that, since the crimes for which he had been convicted had occurred in 1913 and 1915, he could not have been deported on such basis prior to the enactment of the 1952 Act, and

therefore that his petition for naturalization should be determined under the law in effect prior to the 1952 Act. On behalf of the District Director, it was pointed out that, while Section 405 (b) made petitions for naturalization filed before the effective date of the Act subject to prior law "unless otherwise provided", Section 318 specifically required that "notwithstanding the provisions of Section 405 (b)" no final hearing should be held on a petition for naturalization while there was pending a deportation proceeding under the 1952 Act or any other law. After argument, the District Court denied petitioner's motion and vacated the stay. (R. 14–21.) On appeal, the Court of Appeals affirmed the order of the District Court (R. 32–33).[1] Both courts below rejected petitioner's argument that, although his case fell within the literal terms of Section 405 (b) and Section 318, the general savings clause of Section 405 (a) preserved to him the right to have his case considered under the law as it existed prior to 1952. The District Court stated (R. 21):

> It is true that the part of section 405 (a) which continues the old act in force as to any "right in process of acquisition" would, in its general terms, apply to naturalization proceedings, but the fact that section

[1] The deportation hearing was stayed pending appeal. Since the mandate the Court of Appeals has not gone down, it is still stayed.

> 405 (b) specifically makes exact[illegible] that provision as to naturalization proceedings indicates that the general language in section 405 (a) does not apply to them.

The Court of Appeals noted that to read 405 (a) as broadly as petitioner contended would be to make 405 (b) "entirely redundant" (R. 28).

ARGUMENT

In the petition for certiorari filed on behalf of the Government in *United States* v. *Menasche*, No. —, we have called the attention of the Court to the fact that the decision of the First Circuit in that case, 210 F. 2d 809, is basically in conflict with the reasoning of the Second Circuit in this case as to the construction of the saving provisions of Sections 405 (a) and (b) of the Immigration and Nationality Act of 1952.

In this case, in contrast to *Menasche* and the other cases presenting a similar problem mentioned in that petition,[3] the petition for naturalization was actually filed before the effective date of the 1952 Act. Hence it falls within the express terms of Section 405 (b) which provides that:

> Except as otherwise specifically provided in title III, any petition for naturalization heretofore filed which may be pending at the time this Act shall take effect shall be heard and determined in accordance with

[3] In re *Jacson*, 117 F. Supp. 528 (D. Hawaii); *United States* v. *Pringle*, decided May 4, 1954 (C. A. 4).

> the requirements of law in effect when such petition was filed.

Petitioner's case does, however, come within one of the sections "otherwise specifically provided in title III." Section 318 provides:

> Notwithstanding the provisions of section 405 (b) * * * no petition for naturalization shall be finally heard by a naturalization court if there is pending against the petitioner a deportation proceeding pursuant to a warrant of arrest issued *under the provisions of this or any other Act.* [Emphasis supplied.]

It is difficult to imagine how Congress could more clearly or expressly have indicated its intent that the issue of deportability under the new Act should be determined before a determination is made on a petition for naturalization, even though that petition might in other respects be governed by the old law. The decision below is thus clearly correct.

Nevertheless, in holding that the specific savings clause of Section 405 (b) precluded a pending petition for naturalization from creating a "right in process of acquisition" which, under Section 405 (a), is to be governed by the prior law, the decision below conflicts in its reasoning with the view of the Court of Appeals for the First Circuit in *Monasche* that subsection (a) applies to naturalization matters even though subsection (b) is thereby made redundant. Accordingly, if the

Government's petition in *United States* v. *Menasche* is granted, we do not oppose the granting of the instant petition.

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MAY 1954.